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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KYLE LEO KESTER, Defendant and Appellant.	No. A153002 (Sonoma County Super. Ct. No. SCR677280)

Defendant Kyle Leo Kester appeals from the judgment of conviction entered against him after a jury trial for recklessly fleeing a pursuing police officer's vehicle and misdemeanor driving with a suspended license, for which he was granted probation. Defendant argues the prosecutor engaged in prejudicial misconduct in closing argument and the trial court erred in instructing the jury regarding his credibility as a witness, requiring reversal. We disagree and affirm the judgment.

BACKGROUND

In July 2016, the Sonoma County District Attorney filed an information against defendant charging him with recklessly fleeing a pursuing police officer's vehicle (Veh. Code, § 2800.2), receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)) and misdemeanor driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). The information further alleged that defendant had served a prior prison term (Pen. Code, § 667.5, subd. (b)). A jury trial followed.

I.

The Prosecution's Evidence

California Highway Patrol Officer Kenneth Enger testified that on February 15, 2016, he was monitoring the speed of cars along State Route 128 near Geyserville, California. At about 5:55 p.m., his radar gun indicated a white pickup truck was traveling at 60 miles an hour in an area with a 35 miles per hour speed limit. He followed the truck on his motorcycle and conducted a traffic stop on a shoulder of the road. He dismounted his motorcycle and went over to the passenger side of the truck.

Enger, who always took off his sunglasses for a traffic stop, could see clearly without using his flashlight because there was still "plenty of sunlight." He observed the driver was wearing a red and black baseball cap and was the sole occupant of the truck. He told the driver he was travelling at an unsafe speed, and asked for his license, registration and proof of insurance. The driver said he did not have his wallet. He rummaged through 10 or 15 cards in the door arm rest by his side and produced a California identification card for defendant, Kyle Kester, that had been issued by the Department of Motor Vehicles in October 2015. Enger, as he did at every traffic stop, visually confirmed that the picture on the identification card was that of the truck's driver. At trial, he identified defendant as the driver.

Enger radioed for a check of the identification card and the truck's license plate. When he learned the truck had been reported stolen from an Oakland U-Haul facility three days before and noticed a faint outline on the truck where U-Haul stickers might have been removed, he returned to the truck's passenger side and told defendant he would like to hold on to the truck keys until he figured out the status of the truck's registration. Defendant looked at Enger, "grabbed the shifter, threw it into drive, and hammered down on the gas and took off."

Enger told the dispatcher that defendant was fleeing and pursued defendant on his motorcycle. He contacted the dispatcher again and, after debating in his mind whether defendant was white or Hispanic, told the dispatcher defendant was a Hispanic male between 18 and 24 years of age. He also said the truck was a Ford F-150. Defendant is

Caucasian, and the truck Enger stopped was a GMC Sierra. Enger testified that he erred because his heart was beating and he was concentrating on pursuing the truck at the time.

Enger abandoned his pursuit before approaching Healdsburg because he did not want to put the public at risk when he already had the driver's identification. At trial, he had no doubt the driver he stopped was defendant. He was sure of it when he saw the identification card again later on the day of the incident. Also, later that day Enger ran a photo check of defendant and found another photograph of him. Enger concluded this photo was of the truck's driver too. He also learned at some point that day that defendant's driver's license was suspended.

Healdsburg Police Department Officer Hubbel Richmond testified that he was on patrol on February 15, 2016, when he received a dispatch report at approximately 6:05 p.m. that a white GMC pickup truck "had just fled from a CHP officer." Soon after receiving this report, Richmond observed a truck matching that description travelling at "a high rate of speed" that was above the 35 mile per hour speed limit in the area. Richmond saw that the driver was a white male, but could not see his features otherwise. It was dusk, but Richmond could still see objects around him without the use of artificial lighting. He activated his emergency lights and siren and pursued the truck, which accelerated to over 70 miles an hour. Richmond collided with a curb attempting a turn and his vehicle was disabled.

Healdsburg Police Department Sergeant Nick Castaneda testified that he also was on patrol that day. He heard on his radio that Richmond was pursuing a white pickup truck. As Castaneda merged his vehicle onto Highway 101, he observed a white pickup truck "just fly by" in the fast lane at what he estimated was over 90 miles per hour. It aggressively passed an SUV, almost causing a collision. Castaneda, his emergency lights and siren on, pursued the truck for a time, but stopped because it was too dangerous to continue.

A manager with the Department of Motor Vehicles testified that defendant applied for a California identification card in 2012, 2014, October 2015 and January 2016. He was last issued a new card on January 22, 2016. Department records indicated that as of

February 23, 2017, defendant's driver's license had been suspended for a more than two years.

II.

The Defense Evidence

The defense presented as an expert witness Dr. Shari Berkowitz, a professor with a Ph.D. in criminology, law and society who also had conducted research into memory. She testified as an expert in the field of eyewitness memory. She said memory was less like a video recorder and more like a Wikipedia page. Memory can be edited after the fact, and eyewitness memory is malleable. It can be distorted at any of the three stages: the acquisition stage during the event, the retention stage between witnessing an event and later being asked to retrieve the memories, and the retrieval stage. Law enforcement officers might be better than lay people at identifying something suspicious or out of the ordinary, but research indicated they were no better than lay people at recognizing and identifying the face of a stranger. Mistaken identifications generally occur with a well-meaning witness who is not lying.

Berkowitz further testified that during the acquisition phase of eyewitness memory, factors such as lighting conditions, the distance between the parties, the duration of time available to view the face, and clothing items like hats can impact the ability to identify a face. Also, misinformation, which can come in the form of a photograph, can permanently distort memory. If a witness saw an individual during an incident, then a photo of someone else, then later only saw the person who was in the photo, it is possible for the witness to transfer the memory of the first person to match the person seen in the photograph.

Defendant's mother testified that on February 15, 2016, she saw defendant at her Vallejo, California residence in the morning, again around 3:30 p.m., and again at around 5:30 p.m. when he helped her move some buckets of paint from a neighbor's apartment. She was sure of the date because she was angry with defendant for causing his girlfriend's car to be towed the day before, on Valentine's Day. She said she would not lie to help her son and that if he did something, he "need[ed] to pay [the] consequences."

The neighbor who defendant's mother referred to also testified. She said defendant came with his mother to her apartment at about 5:30 p.m. on February 15, 2016, to help his mother install a fixture in her living room and take away some paint cans his mother had used to paint the living room. She remembered defendant came on this date and at this time because they coincided with her husband's return from dialysis treatments he received four weekdays a week.

The neighbor acknowledged that when she spoke to a defense investigator in February 2017, she was unable to recall exactly what day or time defendant had come to her residence in February 2016, and likely told the investigator she had to check with defendant's mother. She indicated there was a lot going on in her life in 2016, making it more difficult for her to remember details. She also testified that she was good friends with defendant's mother and knew defendant and his sister, and that she did not want anything bad to happen to defendant. However, she would not lie.

Defendant also testified about his actions on February 15, 2016. His account was consistent with the testimony of his mother and his mother's neighbor. His recollections of everything he did that day were "vague," but he recalled helping his mother in the late afternoon, before 6:30 p.m., to move paint cans from the neighbor's apartment. Then he was picked up by his girlfriend's friend and they drove to pick up his girlfriend at her workplace in Martinez. He was not in Sonoma County that day and he never met Officer Enger. He had driven the day before, on Valentine's Day 2016 without a valid license, but just to buy a flower for his girlfriend. He was pulled over by police and the car was towed. He was shocked when he was arrested in late February 2016 for the present charges because he did not commit the crime.

Defendant said that in December 2015, at a time when he was homeless, he lost his wallet, which contained his identification card. He thought it was stolen by someone who was around him at the time. He applied to the Department of Motor Vehicles (DMV) for a new identification card and received it in January 2016. Asked why he did not check a box on the DMV application form indicating his previous card had been lost

or stolen, he said he overlooked it, having focused instead on another box that allowed him to apply for a card at a reduced cost.

Defendant also acknowledged he had been previously convicted of a felony for possession of stolen property after pleading guilty to the charge. He nonetheless hoped the jury would believe him and take into consideration all that had been said. He mostly had lived in Vallejo, but had lived at a juvenile group home in Sonoma County previously for about a year and a half. He also had owned red and black baseball caps in the past, including a cap as depicted in a photograph from March 2016, but this was a cap he had just received for his birthday. He was a San Francisco 49ers fan, and all, or most, of his hats were for that team. The team colors were red, gold and white, and the only black on the majority of the hats was a little bit of lettering.

III.

Verdict, Sentencing and Appeal

The jury convicted defendant of recklessly fleeing a peace officer's vehicle and of misdemeanor driving with a suspended license. It deadlocked on the receiving a stolen vehicle charge and the court declared a mistrial on that count. The court suspended imposition of sentence and granted defendant formal probation for a period of 36 months. Defendant filed a timely notice of appeal.

DISCUSSION

I.

Defendant Has Forfeited His Claim of Prosecutorial Misconduct.

Defendant contends the prosecutor committed misconduct when he referred in closing argument to defendant's prior conviction for possession of stolen property as a motivation for his fleeing police officers on February 16, 2015. We conclude defendant has forfeited this appellate claim by not objecting and seeking an admonishment below.

A. The Proceedings Below.

Before trial, the prosecutor moved for the admission into evidence of defendant's 2012 felony conviction for possession of stolen property, both to attack defendant's credibility if he testified and under Evidence Code section 1101, subdivision (b). The

prosecutor sought admission under section 1101, subdivision (b) because this prior conviction showed defendant "would have been made aware of the elements of the crime and what type of conduct would constitute that crime," and "would have presumably known that if he were to be caught in a similar situation, that the penalties could be much more severe, ultimately giving him the motive to run from the cops during that stop." Defendant objected that admission of this prior conviction for any purpose would be unduly prejudicial.

The trial court ruled the prior conviction was for a crime of moral turpitude and allowed the prosecutor to use a sanitized version of it for impeachment should defendant testify. However, the court denied the prosecutor's use of it under Evidence Code section 1101, subdivision (b). The court noted that in that previous case, defendant had been found sleeping in a car containing guns and ammunition that had been reported stolen, yet defendant did not flee. The court, applying Evidence Code section 352, concluded admission of that evidence would be of "much greater" prejudice than probative value.

Defendant testified that he pled guilty to this prior conviction because he was actually guilty but did not plead guilty to the current charges "[b]ecause this was not me. This was not me. Anything else I would have pled guilty to months and months and months ago. I would not be dragging my family here for the past year and a half, making my sister cry in the front row, doing all this to my family if that was me."

During the jury instructions conference, the prosecutor again asked the court if he could refer to the previous conviction as evidence of defendant's knowledge and motive for fleeing from police on February 15, 2016. The court noted the conviction had been allowed in as moral turpitude over defense objection and denied the prosecutor's request. It said, referring to defendant's Valentine's Day incident, "To go into [the conviction] as a motive for fleeing the police, I really believe, especially when he was just stopped the night before and obviously did pull over, would be somewhat speculative and go into maybe a mini trial on that issue. So I did sustain [defense counsel's] objection."

At closing argument, defense counsel argued Enger had misidentified defendant as the driver of the truck, and that an unknown third party had in fact given defendant's old identification car to Enger at the traffic stop. The prosecutor responded in rebuttal, stating: "Reasonable doubt. Is it reasonable what defense is asking you to do? Is it reasonable to think that their fiction is correct, or will you choose to accept the reality? *A convicted felon for possession of stolen property is found in a stolen truck, realizes what's going to happen to him, decides to flee,* endangering countless lives, and then realizing the huge mistake he made, the fact that the I.D. card is in Officer Enger's hands." (Italics added.) Defense counsel did not object or ask the court to admonish the jury regarding this statement.

B. Legal Standards

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair." (*People v. Doolin* (2009) 45 Cal.4th 390, 444.) However, reversal under state law is only required if " ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." ' " (*People v. Davis* (2009) 46 Cal.4th 539, 612.)

To establish prosecutorial misconduct in closing argument, a defendant bears the burden of showing " 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, [reviewing courts] "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Dykes* (2009) 46 Cal.4th 731, 771–772.) We focus on the effect of the prosecutor's remarks on the defendant rather than the intent of the prosecutor (*People v. Hamilton* (2009) 45 Cal.4th 863, 920), and we review the remarks in the context of the entire argument made. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Generally, a defendant forfeits a prosecutorial misconduct claim if he or she does not make a timely objection to the misconduct and asks the trial court to admonish the jury. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) When a defendant fails to object, the claim will only be reviewable if "(1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct." (*People v. Panah* (2005) 35 Cal.4th 395, 463.)

C. Analysis

Defendant does not dispute his counsel's failure to object and seek an admonition. Instead, he contends such action by his counsel would have been futile, including because an objection would only call attention to the prosecutor's remark and any admonition would have been insufficient to cure the harm done by it.

We disagree. There is no indication defense counsel's objection would have been futile, in that the court could well have sustained it. The trial court had already ruled that the prosecutor could not use the prior conviction as evidence of defendant's motivation in fleeing from police on February 15, 2016, including during closing argument. The prosecutor's remark to the jury, brief and vague as it was, could have been taken by the court as prohibited by the court's prior order.

Furthermore, a proper admonition could have cured any harm done by the prosecutor's remark, which was minimal for three reasons. First, in response to the prosecution's effort to impeach his credibility, defendant had testified that he previously had been convicted of possession of stolen property. Thus, the jury had no reason to be especially affected by the prosecutor's remark and, regardless of whether he made the remark or not, took its knowledge of the conviction into deliberations. Second, the prosecutor's remark was brief and its meaning was vague. The jury could have construed it to be an effort to explain defendant's motivation in fleeing from police on February 15, 2016, but this meaning was more implied than expressed. The jury could also have taken the remark as a reference to defendant's lack of credibility and, indeed, it was instructed that it could consider a felony conviction in assessing a witness's credibility. Third, the

prosecutor's remark added little to the jury's understanding of the truck's driver's motivation in fleeing or its evaluation of the only real issue of the case—whether defendant was in fact that driver. It was undisputed that the truck was stolen, that Enger asked the driver for the truck keys after checking on its registration and that the driver fled from Enger and evaded other police while driving at high speeds. This evidence was more than enough to explain the driver's motivation for fleeing the scene; it is easily understandable that a person in possession of a stolen truck might try to evade the police. Given these circumstances, we see no reason why a court could not effectively admonish the jury to consider defendant's prior conviction solely to evaluate his credibility and for no other reason.

Accordingly, we conclude defendant has forfeited his prosecutorial misconduct claim. Defendant urges us to nonetheless exercise our discretionary authority to consider his claim because the prosecutor's misconduct put his counsel in an untenable bind of choosing between objecting and drawing attention to the prohibited argument or ignoring it in the hopes of minimizing prejudice. We decline to exercise this discretion. As we have discussed, the remark was neither particularly prejudicial nor incurable by an admonition. Defense counsel was not put in an untenable bind.

II.

Defendant's Ineffective Assistance of Counsel Claim Regarding Counsel's Failure to Object to the Prosecutorial Misconduct Lacks Merit.

Defendant next argues that, if we conclude he has forfeited his prosecutorial misconduct claim by his counsel's failure to object, we should also conclude he received ineffective assistance of counsel. This argument also lacks merit.

An ineffective assistance of counsel claim requires reversal only if defendant demonstrates that counsel's performance was deficient and prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).) "To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] To demonstrate

prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Mickel*, at p. 198.)

On direct appeal, the record "may not explain why counsel chose to act as he or she did. Under those circumstances, a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Mickel*, *supra*, 2 Cal.5th at p. 198.) "Moreover, we begin with the presumption that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.' [Citation.] Accordingly, . . . a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had 'no rational tactical purpose' for an action or omission." (*Ibid*.)

We find defense counsel's performance was neither deficient nor prejudicial. The prosecutor's reference to defendant's past conviction for possession of stolen property was not new information to the jury, was brief and vague, and mattered little in assessing the only disputed issue in the case—whether defendant was the driver of the truck. Defense counsel could reasonably have concluded the remark did not require that he object or seek an admonition because it would matter little, if at all, in the jury's determination of the case. There was no ineffective assistance of counsel.

III.

The Trial Court Did Not Err in Instructing the Jury on Evaluating the Credibility of Witnesses, Including Defendant.

Defendant also argues his constitutional right to the presumption of innocence was violated by the trial court's "ambiguous . . . instruction" to the jury regarding witness credibility "coupled" with the prosecutor's argument that the jury should consider defendant's status as a defendant in evaluating the credibility of his testimony. We conclude there was no error.

A. The Proceedings Below

The trial court instructed the jury on the credibility of witnesses using CALCRIM No. 226. The court instructed the jury that it alone "must judge the credibility or believability of the witnesses. In deciding whether testimony is true or accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have." The court further instructed the jury that it could "consider anything that reasonably tends to prove or disprove the truth or accuracy" of a witness's testimony and listed ten factors in the form of questions the jury could consider. One of these factors was whether the witness's testimony was "influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided."

The trial court also instructed the jury pursuant to CALCRIM No. 220 that defendant was presumed innocent of the charges brought against him, and that the prosecution had the burden of proving defendant's guilt beyond a reasonable doubt.

In closing argument, the prosecutor stated, "Kyle Kester was driving the 2016 GMC Sierra that night. Once he realized the situation he was in, he made the decision, bad decision, to run. Once he realized that he had made a huge mistake giving over his I.D. card, he has decided to . . . create some sort of justification. He is the only witness who has been able to testify after seeing every last bit of evidence against him. [¶] Kyle Kester has all the motive, all the bias to tell the story that will keep him out of trouble. Again, bias, motive, credibility." The prosecutor also said about defendant, "you have the motivations of somebody trying to stay out of trouble."

In rebuttal, the prosecutor added, "Defendant has every motive to craft his case. The answers that he is giving are after all the evidence has been heard against him. Please look at your notes. Remember his demeanor. The way he was answering. The way he could give a justification for any question that was given him. He's had almost 16 months to think about it, after reading everything that would be presented against him."

B. Legal Standards

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." (*Ibid*.)

Nonetheless, it has long been held that when a defendant chooses to testify, his "credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens." (*Reagan v. United States* (1895) 157 U.S. 301, 305 (*Reagan*).) "It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony, and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury" (*ibid*.), provided that it contain "no declaration nor intimation that the defendant has been untruthful in his testimony." (*Id*. at p. 311; see also *Quercia v. United States* (1933) 289 U.S. 466, 470 [it "is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf"].)

Our own Supreme Court historically has followed a similar approach. It has even allowed instructions regarding defendant's interest in testifying, "which every intelligent [person] upon the panel would doubtless keep in mind, without being reminded of it by the court." (*People v. Ryan* (1907) 152 Cal. 364, 369; see also *People v. Brown* (1943) 22 Cal.2d 752, 756–758 [a credibility instruction regarding defendant's interest in the outcome of the trial that also instructed his testimony was to be considered like any other witness and be weighed " 'fairly' " was not prejudicial error].) However, it has held impermissible an instruction to consider " 'the consequences, inducements, and temptations which would ordinarily influence a person in [defendant's] situation' "

because it "can be with no other purpose than to throw [a court's] judicial weight into the scales against the defendant." (*People v. Maughs* (1906) 149 Cal. 253, 262–263.)

Defendant, ignoring its reasoning, argues that *Reagan* should be viewed as an inapposite statutory analysis based on a dissent by Justice Ginsburg in *Portuondo v. Agard* (1999) 529 U.S. 61, 80 (dis. opn., Ginsberg, J.), and our courts have not recently addressed how to properly instruct on a testifying defendant's credibility without undermining the presumption of innocence. However, federal appellate courts have addressed this issue. (See *United States v. Gaines* (2d Cir. 2006) 457 F.3d 238, 245 [noting that *Reagan* analyzed the instruction issue "in the context of a defendant's right to testify, which at the time was a statutory right," but that "[m]ore recently, courts have evaluated challenges to such instructions against the backdrop of the presumption of innocence"].) Those courts have carefully walked a line between protecting the presumption of innocence and allowing a jury to evaluate the credibility of all witnesses in the same way, including testifying defendants. Instructions may tell a jury it can consider a testifying witness's interest in the outcome of a case as one of several factors regarding witness credibility, including the credibility of a testifying defendant, provided that there is "no specific charge for a defendant's testimony." (*Gaines*, at pp. 244, 248–249 [vacating conviction because the jury was specifically instructed it could consider the defendant's "deep personal interest" in the outcome of the case and his resulting "motive for false testimony"]; *United States v. Quinn* (1968) 398 F.2d 298, 303 [approving a general witness credibility instruction regarding a defendant who, by testifying, made his "interest in the outcome of the case . . . relevant to the weight to be given by the jury to his testimony"].) However, instructions may not indicate that "a testifying defendant's interest in the outcome of the case creates a motive to testify falsely." (*Gaines*, at p. 246.) A trial court "should not instruct juries to the effect that a testifying defendant has a deep personal interest in the case. Rather, a witness's interest in the outcome of the case ought to be addressed in the court's general charge concerning witness credibility. If the defendant has testified, that charge can easily be modified to tell the jury to evaluate the defendant's testimony the same way it judges the testimony of other

witnesses." (*Id*. at p. 249; *United States v. Brutus* (2d Cir. 2007) 505 F.3d 80, 85, 87–88 [improper to instruct "that the interest which a defendant has in the outcome of the case is an interest which is possessed by no other witness" and that "such an interest creates a motive to testify falsely"].)

We review jury instructions de novo to determine if they correctly state the law. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1418.) Furthermore, "It is well established that [an] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record. [Citation.] In addition, in reviewing an ambiguous instruction . . . , we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Covarrubias* (2016) 1 Cal.5th 838, 906.)

C. Analysis

Defendant argues the trial court's instruction pursuant to CALCRIM No. 226, read in isolation, was not necessarily in error. However, he contends the instruction was sufficiently ambiguous that, when coupled with the prosecutor's remarks about defendant's interest in the case and motive to fabricate, there was a reasonable likelihood that the jury applied the instruction in a manner that undermined the presumption of innocence.

We disagree. There was nothing ambiguous about the court's instruction. Consistent with the state and federal cases we have reviewed and their reasoning, with which we agree, the court instructed the jury to consider the credibility of all witnesses in the same manner, and that this consideration could include whether a witness's testimony was "influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." (See also Evid. Code, § 780, subd. (f) [jury may consider in determining a witness's credibility "[t]he existence . . . of a bias, interest, or other motive"].) The court did not single out any issues about defendant's credibility, nor did it suggest that any witness's personal interest in the outcome of the case necessarily caused a bias or motivation to lie; it simply

highlighted among the many factors the jury could consider one that was dictated by common sense: that the jury should consider carefully the testimony of a witness with an interest in the case, "which every intelligent [person] upon the panel would doubtless keep in mind, without being reminded of it by the court." (*People v. Ryan, supra,* 152 Cal. at p. 369.) The court also properly instructed the jury that defendant was presumed innocent and the prosecution bore the burden of proving his guilty beyond a reasonable doubt. There was nothing ambiguous or improper about these instructions.

Given our conclusion that the instructions were clear and proper, we have no need to address defendant's arguments about the impact or propriety of the prosecutor's remarks. We note, however, that, given the conflicting evidence about the truck driver's identity and the prosecutor's questioning of defendant's credibility based also on his demeanor, case law would support the conclusion that the prosecutor's remarks were not improper. (See *Portuondo v. Agard, supra,* 529 U.S. at pp. 65–73 [prosecutor's remarks that the testifying defendant had the opportunity to hear all other witnesses testify and tailor his testimony accordingly did not violate defendant's Fifth, Sixth or Fourteenth Amendment rights]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1223 ["it was appropriate for the prosecutor to argue that the jury could consider whether defendant had a motive to lie . . . arising from his interest in the outcome, i.e., to avoid conviction," particularly because the prosecutor did not argue this was the "sole determinant" of defendant's credibility].)

In short, defendant's argument that the trial court's witness credibility instruction undermined the presumption of innocence to which he was entitled lacks merit.

DISPOSITION

The judgment is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

People v. Kester (A153002)